

0001

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF SACRAMENTO

3 ---o0o---

4 HON. STEVEN H. RODDA, JUDGE, DEPARTMENT 44/1

5 ---o0o---

6 LAURENCE LUCIER and LAURIE LUCIER,)

)

7 Plaintiffs,)

)

8 -vs-)

No. 02AS01909

)

9 PHILIP MORRIS INCORPORATED, and,)

R.J. REYNOLDS TOBACCO COMPANY)

10)

Defendants.)

11)

12 ---o0o---

13 REPORTER'S DAILY TRANSCRIPT OF PROCEEDINGS AT JURY TRIAL

14 ---o0o---

MONDAY, JANUARY 13, 2003

15 ---o0o---

16 APPEARANCES:

17 For the Plaintiffs:

18 PAUL & JANOFSKY

By: GARY M. PAUL,

19 Attorney at Law

1401 Ocean Avenue, Suite 200

20 Santa Monica, California 90401-2103

21 MARY ALEXANDER & ASSOCIATES

BY: MARY ALEXANDER,

22 Attorney at Law

44 Montgomery Street, Suite 1303

23 San Francisco, California 94104-4612

24 WARTNICK, CHABER, HAROWITZ & TIGERMAN

BY: ROBERT M. BROWN,

25 Attorney at Law

101 California Street, Suite 2200

26 San Francisco, California 94111-5802

---o0o---

27

THOMAS B. HENNESSY, CSR No. 5179

28 MICHELLE K. MADRID, CSR No. 11401

0002

1

2

3

APPEARANCES (Cont'd):

For the Defendant Philip Morris Incorporated:

SHOOK, HARDY & BACON

By: GERALD V. BARRON, Attorney at Law

By: STEPHANIE A. SCHRANDT, Attorney at Law

By: ANNIE Y.S. CHUANG, Attorney at Law

333 Bush Street, Suite 600

San Francisco, California 94104-2828

SHOOK, HARDY & BACON

By: DEBORAH A. SMITH, Attorney at Law

One Kansas City Place

1200 Main Street

Kansas City, Missouri 64105-2118

For the Defendant R.J. Reynolds Tobacco Company:

JONES, DAY, REAVIS & POGUE

By: THEODORE M. GROSSMAN, Attorney at Law

By: STEVEN N. GEISE, Attorney at Law

North Point

901 Lakeside Avenue

Cleveland, Ohio 44114-1190

JONES, DAY, REAVIS & POGUE

By: DANIEL J. McLOON, Attorney at Law

555 West Fifth Street, Suite 4600

Los Angeles, California 90013-1025

JONES, DAY, REAVIS & POGUE

By: HAROLD K. GORDON, Attorney at Law

222 East 41st Street

New York, New York 10017

JONES, DAY, REAVIS & POGUE

By: ELIZABETH P. KESSLER, Attorney at Law

41 South High Street, Suite 1900

Columbus, Ohio 43215

---o0o---

THOMAS B. HENNESSY, CSR No. 5179

MICHELLE K. MADRID, CSR No. 11401

C H R O N O L O G I C A L I N D E X

--o0o--

Page

Monday, January 13, 2003

8376

Proceedings outside the presence of the jury

re Juror Note

8376

Jury present

8396

8 DAVID TOWNSEND, Ph.D.

9 Cross Exam (Cont'd) by Mr. Paul 8396

10 Monday, January 13, 2003, P.M. Session 8470

11 Jury present 8476

12 Cross Exam (Cont'd) by Mr. Paul 8476

13 Proceedings outside the presence of the jury

14 re Exhibit 107 8484

15 Jury present 8487

16 Cross Exam (Cont'd) by Mr. Paul 8487

17 Proceedings outside the presence of the jury

18 re Alternate Juror No. 1 8507

19 Cross Exam (Cont'd) by Mr. Paul 8509

20 Proceedings outside the presence of the jury

21 re Exhibit 8018 8528

22 Proceedings outside the presence of the jury

23 re Alternate Juror No. 1 8530

24 Cross Exam (Cont'd) by Mr. Paul 8532

25 ---o0o---

26

27

28

0004

1 E X H I B I T S I N D E X

2 ---o0o---

3 Plaintiff's

4 No.	Description	I.D.	I.E.
5 60	Invalidation of Some Reports in the		
6	Research Department	8455	8464
7 447	Ammoniation	8512	----
8 8006	Review of Bio-Test (IBT) Manuscripts		
9	On Freon 11 Expanded Tobacco, etc.	8465	8466
10 8011	Interoffice Memos dated 4-2-87	8537	8538

11 8012 Memo re Nicotine to Morse from
12 Rodgman, 9-8-80 8514 8514
13 8014 Free Nicotine, 7-12-73, W.S. Smith 8499 8500
14 8016 The Merit Cigarette, 5-13-76 8504 8509
15 8018 Company to Discontinue Research in
16 Areas Not Related to Tobacco, etc. 8490 8530

17 ---o0o---

18

19

20

21

22

23

24

25

26

27

28

8376

1 MONDAY, JANUARY 13, 2003

2 (Morning Session)

3 ---o0o---

4 The matter of LAURENCE LUCIER and LAURIE LUCIER, et
5 al, Plaintiffs, versus PHILIP MORRIS INCORPORATED, et al.,
6 Defendants, Case No. 02AS01909, came on regularly this day
7 before the Honorable Steven H. Rodda, Judge of the Superior
8 Court of the State of California, for the County of
9 Sacramento, Department 44/1 at 9:05 o'clock a.m.

10 The Plaintiffs, LAURENCE LUCIER and LAURIE LUCIER,
11 were represented by: GARY M. PAUL, Attorney at Law;
12 MARY ALEXANDER, Attorney at Law; and ROBERT M. BROWN,
13 Attorney at Law (not present).

14 The Defendant PHILIP MORRIS INCORPORATED was

15 represented by: GERALD V. BARRON, Attorney at Law;
16 STEPHANIE A. SCHRANDT, Attorney at Law; DEBORAH A. SMITH,
17 Attorney at Law; and ANNIE Y.S. CHUANG, Attorney at Law,
18 (not present).

19 The Defendant R.J. REYNOLDS TOBACCO COMPANY was
20 represented by: THEODORE M. GROSSMAN, Attorney at Law;
21 HAROLD K. GORDON, Attorney at Law; ELIZABETH P. KESSLER,
22 Attorney at Law; DANIEL J. McLOON, Attorney at Law,
23 and STEVEN N. GEISE, Attorney at Law.

24 The following proceedings were then had:

25 ---o0o---

26 MR. GROSSMAN: Good morning, your Honor.

27 THE COURT: Good morning.

28 (All say "good morning".)

8377

1 THE COURT: Was there something to take up?

2 MR. PAUL: Yes, your Honor.

3 At the end of the day on Friday, we were handed a
4 note from a juror that I guess I can paraphrase --

5 THE COURT: I've got it right here. Aaron gave this
6 to me, I'll read it.

7 Is that the subject of the discussion?

8 MR. PAUL: Yes your Honor.

9 THE COURT: The note says, "We have been advised that
10 we can consider the demeanor of the witness, so the concern
11 is what we should do if we notice head and eye signals
12 between the attorney and the witness. For example, if a
13 question is asked and the attorney signals and says 'don't
14 answer' and the witness acknowledges 'I know'" -- Those are
15 both in quotation marks -- "This would include persons
16 sitting throughout the courtroom."

17 Was that the subject of your concerns?

18 MR. PAUL: Yes, it is, your Honor.

19 Number one, I think it is appropriate under the
20 circumstances that those questions be responded to,
21 especially this one. Obviously, the juror should be advised
22 that they can take into -- And they are to take into
23 consideration, if they wish, the demeanor of witnesses,
24 they're even instructed on that.

25 But there's a second, more overriding concern that I
26 have. Obviously, if jurors are noted of this, I've got some
27 grave concerns about what's going on in this -- If in fact
28 there is in this courtroom --
8378

1 We've all been trial lawyers for a very long time,
2 and we know the rules, and that certainly should not be
3 going on in this courtroom. And we've had a previous
4 example of reactions, either from attorneys or people
5 sitting in -- In the audience. One case was laughing at my
6 client when he was on the stand.

7 I'm not sure how to deal with it, but I think it
8 needs to be responded to. I think it is totally
9 inappropriate if it is occurring. I know from time to time
10 these kinds of things do occur in trials. And I just --
11 I'm not sure how to advise -- Or what I would advise --
12 Other than I think this question needs to be answered to the
13 jurors, because I think they do need to take this into
14 consideration in their evaluation.

15 Thank you.

16 THE COURT: Okay. Before we get further into the
17 substance of this, apparently the Court attendant advised me
18 on Friday that the note came from juror, Alternate Juror
19 One -- And handed me the note. And I said share it with
20 counsel; we'll take it up on Monday morning. So that's the
21 extent of my knowledge.

22 In terms of my -- Mr. Paul, you are situated so that
23 you can't see defense counsel and people in the audience,
24 and I'm -- I try to keep aware of such things as they
25 occur. And, frankly, I haven't myself observed this
26 occurring -- Notwithstanding this note. That doesn't mean
27 to say it didn't occur, but I haven't observed that
28 happening.

8379

1 But the probability is it happened probably on an
2 isolated case or two. I'm just speculating now because I
3 haven't actually seen that occur.

4 Mr. Grossman, you look like you're prepared to
5 respond to this.

6 MR. GROSSMAN: I am.

7 As you might imagine, your Honor, when we got the
8 note, we were very perplexed.

9 I can only presume that the juror, or alternate juror
10 was writing the note contemporaneously, and it related to
11 Dr. Townsend's testimony -- Didn't have the time -- But it
12 arose on Friday when Dr. Townsend had been testifying.

13 I spoke with Dr. Townsend; I've spoken with all of
14 our counsel -- and others who are related to us who have
15 been in the room. We shuffle papers from time to time, and
16 I've admonished everybody to be quiet and careful when we
17 try to converse with each other.

18 I know every one of us went through our mind: Is
19 there anything that could have been interpreted that way?
20 And you get paranoid. But none of us could think of
21 anything that could have been interpreted that way.

22 I know the witness answered every question. The note
23 itself said -- Referred to someone that -- The alternate
24 thought she saw signals, "don't answer", and the witness

25 said "I know".

26 And the witness answered every question.

27 So, we were very disturbed that the note would come.

28 We obviously -- Obviously, it -- It's not the kind of
8380

1 thing that we would want anyone to believe or perceive. We

2 know it didn't happen.

3 We did a little research also on jury instructions.

4 And there was a case called Zhadan, Z-H-A-D-A-N,

5 versus Downtown Los Angeles Motor Distributors, which is 100

6 Cal. App. 3rd, 821. It arose in the second Appellate

7 Division, 1979.

8 The particular passage -- I'll just read it -- Was:

9 "During examination of witness Nora Watson

10 a juror reported that plaintiff was nodding or

11 shaking her head, which appeared to be an attempt

12 to surreptitiously coach the witness on the

13 defendant's motion for mistrial. The Court --

14 And on the defendant's motion for mistrial.

15 The Court conducted a hearing. Neither the Court

16 nor the bailiff had observed any motions of

17 plaintiff's head, and plaintiff denied nodding or

18 coaching the witness.

19 "The Court denied the motion, observing

20 that, in any event, Nora Watson's testimony

21 contained merely corroboration of events to which

22 plaintiff had previously testified.

23 "The Appellate Court confirmed the Trial

24 Court's decision not to give an instruction."

25 I think that if any instruction is given, it should

26 simply be that -- If anything of this kind occurred it

27 would be -- It would be inappropriate. It would be grounds

28 for a mistrial and for sanctions. And we know it hasn't

8381

1 occurred. I've admonished everybody to insure that there's
2 nothing that could be interpreted as that occurring, and I
3 think if the Court were to respond to the note at all, it
4 should be along the lines simply that the Court observes the
5 witnesses and the -- The -- And keeps control of the
6 courtroom. And if any juror has any question about that, to
7 raise it with the Court.

8 THE COURT: Okay. Well, I --

9 MR. GROSSMAN: I would also say the BAJI instruction,
10 as good as the BAJI instruction is, it certainly relates to
11 the demeanor of witnesses, and the jury will be instructed
12 on that at the end of the case.

13 MR. PAUL: I'm not suggesting that the Court should
14 say, "I'm in control of the courtroom, and I observe
15 everything and I see everything." Obviously, jurors, those
16 of us who have tried lots of cases know that jurors see
17 things something, and sometimes they see things that don't
18 really happen. But I'm more concerned about something in
19 response to the question.

20 By that, I'm concerned about jurors asking questions,
21 and then there's no response, which means that we don't care
22 about what you're asking.

23 So I think the jurors need to be told in response to
24 the question that, yes, you can take into consideration the
25 demeanor of a witness. That's --

26 THE COURT: We're just kind of exploring things now,
27 but let me just say that there are alternative ways to
28 approach this issue.

8382

1 First of all, we got the note from one specific
2 juror. These -- These are based upon that juror's
3 observations, presumably.

4 We could, at the request of counsel, inquire as to
5 that juror as to what he saw and what, you know, why he
6 reached this conclusion. But I'll do that only if there's a
7 request from counsel.

8 The other aspect of this that I find troubling --
9 And I'm just exploring things now -- is: If we respond to
10 this question, that assumes that this has occurred, and it
11 invites the other jurors to speculate about it. And it may
12 have some unintended effect as a result of that. And I'm
13 reluctant to just confirm the veracity of this without
14 exploring that and interjecting this thought when the other
15 jurors may not have observed anything at all, or have
16 interpreted things quite differently.

17 So I think that I -- My inclination would be not to
18 move too quickly on this.

19 MR. GROSSMAN: Your Honor -- Oh, I'm sorry.

20 THE COURT: Mr. Barron has a thought.

21 MR. BARRON: I do have some thoughts. I agree with
22 everything you just said.

23 I do not think that the issue should be directed to
24 the entire panel -- and for the reasons that you said -- and
25 am especially sensitive to the fact that we could wind up
26 with a frame of mind on the part of the panel members that
27 is created by sort of the Court's response to the one
28 juror's written question.

8383

1 I think, if anything, there ought to be a response in
2 writing perhaps directed just to that juror.

3 But in any event --

4 THE COURT: Well, let me just say right now that the
5 rule is you can't respond directly to jurors. You have to
6 respond to them as a group. So I can't communicate with
7 just one juror on this. I can engage in some discussions

8 outside the presence of the jury to find out what happened,
9 but I'm very, very reluctant to give any instructions to one
10 juror alone, as opposed to the entire group.

11 MR. BARRON: Well, I accept your understanding. I,
12 frankly, didn't look it up. I don't know, and I accept that
13 as being the case.

14 If that were the case, I would stand by my original
15 comment, and I think it would be dangerous to take one
16 juror's question and turn it into a question that it --
17 Such as all the panel members are now assessing.

18 And I think I really ought to say one thing for the
19 record and in fairness to the parties:

20 I am pleased that Mr. Gross- -- That, as
21 Mr. Grossman said, he is cautioning his people and people in
22 the audience to make sure that nothing is being done, such
23 that nothing could be interpreted such as this juror has
24 occurred. It is difficult with Mr. Paul when he is asking
25 questions to say exactly what happened. I can't say that I
26 observed everything, but I certainly did not observe the
27 type of thing that the juror suggested.

28 I think I also need to say for the record that what
8384
1 is striking to me was that on a couple of occasions there
2 were questions in which it was fairly clear to me what
3 Mr. Grossman would like to have elicited. And I can think
4 of one example which was the question of additives or
5 flavorants to try to, in essence, reduce risk by getting it
6 to be more appealing to people.

7 And Dr. Townsend did not accept that proposition,
8 actually said, no, I just don't think that was the reason.

9 So what I observed was someone who was trying to
10 rigorously give his own thoughts and opinions in response to

11 questions, but not in effect being led by them.

12 That's just a personal observation.

13 So I give it -- Because I do think it doesn't
14 deserve, therefore, the situation, a comment or a question
15 to the entire panel, and personally for a co-defendant it
16 could have some adverse implications for our defense chances
17 to have something like that occur.

18 THE COURT: Mr. Paul?

19 MR. PAUL: Well, I understand everything that's being
20 said, and I understand that this is sort of a thin-ice kind
21 of situation. I think it would be appropriate under the
22 circumstances for the Court to talk to the juror and see
23 what it is that -- We're presuming other jurors didn't see
24 it too; that may or may not be true.

25 But I think it would be appropriate.

26 But if it were done, I think the only person who
27 should be questioning the juror would be your Honor.

28 THE COURT: That's right.

8385

1 MR. PAUL: I don't think any of the jurors should be
2 involved in questioning --

3 THE COURT: That's a given.

4 MR. PAUL: -- Or say anything.

5 MR. PAUL: Further, I do not think that the witness
6 should be sitting on the stand at the time that this
7 occurs -- In fact, I think probably should be out of the
8 courtroom at the time the discussion occurs with the juror.
9 That would be my opinion.

10 I think it would be appropriate maybe that only the
11 people that are involved in this case directly, the Court
12 and staff and the attorneys that are actually trying the
13 case, should be in the courtroom at the time of the
14 questioning occurring.

15 But I would think under the circumstances it probably
16 makes sense, because I would like to get to the bottom of
17 it.

18 The Court is right; I have my back. I can't really
19 see what's going on behind me -- during my questioning. So
20 although I do turn around from time to time, but I think it
21 would be appropriate to talk to the juror.

22 THE COURT: Mr. Barron -- I mean Mr. Grossman.

23 Excuse me.

24 MR. GROSSMAN: That's all right. I take it as a
25 compliment.

26 And I just have two things to say -- In response to
27 what Mr. Paul was saying before.

28 The first is, as to the need for an instruction, your
8386

1 Honor, one of the things we looked at over the weekend was
2 your Honor's original instructions, because the juror's note
3 referred to the earlier instruction. And what your Honor
4 told the jury was that they can hand a piece of the paper to
5 the bailiff, and if it's an appropriate question, then the
6 probability is that it will be answered during the course of
7 the evidence, maybe not immediately, but at some point in
8 time. But it may be something to which there is no evidence
9 or something that's objectionable or shouldn't be
10 considered.

11 If that occurs, "I'll not tell you why your answer to
12 the question hasn't been answered, because you just won't
13 get an answer."

14 So the jury has already been told that not every
15 question posed to the Court will be answered, and there have
16 been many questions posed to the Court so far that were
17 never answered.

18 For example, there was a note during the course of
19 Dr. Farone's testimony as to whether that testimony was to
20 be limited to R.J. -- To Philip Morris or whether -- And
21 that was never answered.

22 As to calling in the juror, it's entirely within the
23 Court's discretion. My view is that there are some -- That
24 it's hard to limit that procedure, because it could lead to
25 attorneys testifying, or for the need to requestion the
26 juror, after people in the courtroom have been questioned.
27 I mean, I don't know -- I don't know how the procedure
28 works under the circumstances.

8387

1 THE COURT: What -- That's something that concerns
2 me as well.

3 MR. GROSSMAN: Yeah.

4 THE COURT: If we make this inquiry, Mr. Paul, what's
5 the -- And I was the one that originally suggested this as
6 an alternative; I concede that.

7 But where ultimately are we going with this? If the
8 juror says he observed something, is that going to result in
9 making inquiry of all the jurors, and if those jurors have
10 seen something?

11 Is that a basis for excusing them or, you know,
12 taking further, more extreme measures, or what? So we're
13 embarking upon a process where we should have some idea as
14 to where this is going to end up.

15 MR. PAUL: Well, I don't think it leads to any of
16 those grave areas. I think what the juror's original
17 question was in fact correct, where the juror says, can we
18 take into consideration the demeanor and -- And it goes on
19 to explain what they saw.

20 The answer to that question is clearly, yes, they
21 can. They can watch -- They can watch the witness and make

22 their own judgments about whether the witness is being
23 straightforward with them or not.

24 I don't think this leads to questioning of attorneys.
25 I don't think it even has to go into that area. No one is
26 being accused of misconduct at this point. I'm not claiming
27 that there should be a mistrial. I'm saying that what I'm
28 more concerned about is this juror has raised a legitimate
8388
1 question, and then we end up not responding to it.

2 Now, there's two consequences to that: The first
3 consequence is the juror's response is: Well, I must have
4 been wrong; otherwise the Court would have told me
5 something.

6 Or (B), they don't care what I say; they're ignoring
7 me. That's the problem. This is a legitimate question.
8 The answer to this question is clearly yes. And the problem
9 is that if we do nothing, they never get a response to the
10 question.

11 Now --

12 THE COURT: So what are you proposing?

13 MR. PAUL: My proposal would be -- And the reason I
14 raised it in the first place is, there ought to be a
15 response to this question which the answer is, yes, you may
16 take into consideration the demeanor of a witness.

17 Now, I understand all the concerns that have been
18 raised here by saying that to the entire panel, but the
19 answer to that question is, yes, they obviously can.

20 If we're more concerned about, oh, gee, well, we
21 don't want to poison the entire jury by answering this
22 question about, yes, ladies and gentlemen, I don't even
23 think the answer needs to be any more than "you may take
24 into consideration" -- We were asked a question: Is the

25 demeanor of the witness to be taken into consideration?

26 The answer to that question is yes.

27 I don't think you need to answer any more than that,

28 frankly, but if there's some concern that that may infect

8389

1 the jury in some fashion, then I think it would be

2 appropriate -- And I would request that the Court question

3 the juror and at least respond directly to the juror about

4 this issue.

5 And I don't think that gets into lawyers having to

6 take the stand and all the rest of it. I mean, this is not

7 like someone is accusing anybody of -- It would be

8 inappropriate behavior in a courtroom. But I don't know

9 that these are grave consequences that are being raised

10 here. It's a very straightforward question: Can we take

11 into consideration the demeanor, and if we see something

12 that we deem to be inappropriate, can we take that into

13 consideration?

14 And answer is yes.

15 THE COURT: Well, in reading this more questioning

16 now: "What should we do if we notice hand and eye signals

17 between the attorneys and the witness?" that that's

18 something that could be speculation, for example, if the

19 question is asked and the attorney signals "don't answer",

20 and he just answered, "I know".

21 He is using this as an extreme example, and based

22 upon what, this note -- If the witness's answer was, "I

23 know," I think all of the jurors would have seen that.

24 I don't think this is a definitive basis of what

25 occurred here.

26 So your final thoughts on this, Mr. Grossman?

27 MR. GROSSMAN: Thank you, your Honor.

28 I think that if we were to dignify this, particularly

1 in light of your Honor's observations, of course, whether it
2 responds to this particular question, it would inject
3 prejudice to the defense.

4 I also think that if we were to give what sounds more
5 like, of what sounds like a vanilla kind of an instruction,
6 which Mr. Paul was suggesting -- The instruction is that
7 you can take demeanor into account -- Of course, that's
8 appropriate.

9 But the timing of the instruction would -- We never
10 would have given -- Would sound as though it were relating
11 to a particular witness's testimony. There is going to be
12 that type of an instruction at the end of the case. Both
13 the plaintiffs and defendants have submitted proposed
14 instructions, BAJI instructions, that tell the jury that
15 they should take into account the demeanor of the witness
16 while they're testifying. I think that's the appropriate
17 time to be instructed in that regard.

18 THE COURT: Are you asking -- Mr. Grossman, so I'm
19 clear, are you asking that I respond to this by an
20 instruction?

21 (Mr. Grossman shaking his head.)

22 THE COURT: The answer is "no"?

23 MR. GROSSMAN: The answer is "no".

24 THE COURT: Are you asking that I bring this jury in
25 and make inquiries as to what happened?

26 MR. GROSSMAN: No.

27 THE COURT: What are your thoughts on those two
28 questions?

1 MR. BARRON: My position is the same.

2 And in fact echoing and underscoring the first point
3 that Mr. Grossman made, not only will they be instructed at

4 the end, you may remember, your Honor, that at the very
5 beginning of the case, when you were speaking about
6 note-taking, you indicated that materials for note-taking
7 would be provided to them, that they were free to, you know,
8 take as many notes as they wished or free not to make notes.

9 And then you did indicate -- I don't mean to quote
10 you in any way, but, in essence, you said that one of their
11 jobs was not only to, in essence, try to assimilate the
12 statements being made by the witness, but also to assess the
13 witness. And you did talk about in essence his demeanor.
14 And that was at the beginning of the case, as you mentioned.

15 I don't have the exact date at which you did that,
16 but I have a clear memory of you doing it.

17 So the principle has already been provided to them,
18 and it can be reiterated at the close of the case.

19 MR. PAUL: Your Honor, I'm not -- I must say that
20 I'm extremely concerned about the fact that jurors are
21 asking questions, and in this case it's a very important
22 question. And basically what I'm hearing from the defense
23 counsel is we should do nothing in response to it.

24 This is not the first time jurors have commented upon
25 things that have occurred at defense counsel table. A juror
26 wrote a note to you previously about talking during
27 questioning of witnesses and shuffling of papers during the
28 course of testimony and how distracting it was. We
8392

1 responded -- We never responded to the juror, but we
2 said --

3 THE COURT: I think this is the same juror, actually.
4 Wasn't it, Aaron?

5 THE COURT ATTENDANT: I don't remember about the
6 first one that Mr. Paul is referring to.

7 THE COURT: Okay.

8 MR. PAUL: But now, if this juror goes un-responded
9 to, the only implication we're giving this juror is is what
10 they brought up is unimportant or irrelevant to what's going
11 on here, and it's not.

12 Now, I understand that the Court is observing the
13 courtroom, but if this witness, or this juror has seen
14 something from this witness and the attorneys that causes
15 this juror enough concern that he writes a note about it, we
16 ought to do something in response to it and not just ignore
17 this concern.

18 THE COURT: How about this?

19 "Friday a juror made an inquiry about one of the
20 Court's instructions, one of the Court's earlier
21 instructions. The Court has fully discussed this matter
22 with the attorneys. At the conclusion of the case the Court
23 will fully instruct the juror on all matters related to this
24 proceeding. The jurors are not to speculate about the
25 juror's specific question."

26 MR. PAUL: I have strong disagreement with your
27 Honor. I have great respect for this Court, but I think
28 that doesn't do anything to respond to the jury's concern.
8393

1 THE COURT: Well, it let's them know that I've talked
2 to the lawyers about it, and the implication is there: The
3 lawyers are on notice not to do this again; it tells them
4 that we are going to fully instruct on the matters.

5 I invite you to relate to the specific matter to be
6 included in this instruction packet, but also it advises the
7 jurors not to speculate about this matter at the present
8 time. So it avoids any potential prejudicial effect for all
9 the reasons that have been discussed here.

10 MR. PAUL: The implication, though, your Honor is

11 that I agree with that instruction. "I discussed with
12 counsel, and here's what we think."

13 I'm sorry; I cannot agree with this.

14 THE COURT: What part of it do you disagree with?

15 MR. PAUL: Well, I don't remember the exact wording,
16 your Honor, but I think you said that it's been discussed
17 with counsel and that you will be instructed at the end of
18 the case. The implication is that I -- At least that all
19 counsel agree with that. I do not.

20 MS. ALEXANDER: It also implies that this maybe
21 didn't happen. We discussed it with counsel, and maybe you
22 think that it didn't happen. And it happened.

23 THE COURT: I don't think it carries that implication
24 myself.

25 What, alternatively, would you ask that I do by way
26 of instruction, Mr. Paul?

27 MR. PAUL: I think the jury ought to be instructed
28 that the question was asked whether or not the demeanor of
8394
1 witnesses can be taken into consideration, and the answer to
2 that question is yes.

3 As I've instructed you previously that the demeanor
4 of witnesses is something that you can take into
5 consideration.

6 THE COURT: Okay. And that would focus this matter
7 on this witness, who is a significant defense witness --
8 And suggests something inappropriate. And I'm not prepared
9 to do that under these circumstances.

10 Mr. Grossman and Mr. Barron, are you collectively
11 asking that I give this substance, the instruction I've
12 prepared?

13 MR. GROSSMAN: Your Honor, I have no problem with the
14 instruction you've prepared.

15 I would make one little suggestion, which is, rather
16 than "last Friday", "at an earlier session with the Court."
17 It's not as strong -- Issue. It's just -- (pausing) --

18 THE COURT: I'll just take a minute, and then we'll
19 proceed.

20 MR. PAUL: Thank you.

21 MR. GROSSMAN: Thank you, your Honor.

22 (A short break was taken in place at 9:40 am.)

23 ---o0o---

24 THE COURT: Okay. This is a troubling issue, and I
25 am just going to give the instruction in the substance that
26 I just proposed a few minute ago. I think that's the
27 appropriate, most appropriate way to do things and the least
28 prejudicial under all the circumstances.

8395

1 I am going to be keeping a close eye on what's going
2 on at the counsel table and in the audience area. If I
3 observe something inappropriate, I am going to take measures
4 right at the moment to address that issue, and that may
5 result, if I do that, in some concern for counsel --
6 Because I'm not going to let it go. Okay?

7 Bring the jury in.

8 (The jurors are brought in at 9:43 am.)

9 ---o0o---

10 THE COURT: Good morning; appreciate your patience
11 here.

12 Before we proceed, I just have a little note that I
13 am going to read to you.

14 Last Friday the Court received a juror
15 inquiry about one of the Court's earlier
16 instructions. The Court has fully discussed this
17 matter with the attorneys, and at the conclusion

18 of the case the Court will fully instruct the jury
19 on all matters necessary for an appropriate
20 discussion of this case and a verdict. The jurors
21 are not to speculate about the specifics of this
22 question.

23 And let me remind you not to discuss the case among
24 yourselves.

25 Okay, that includes while you're on a break, while
26 you're in the jury box, you shouldn't be talking about
27 anything that's going on in this trial. You have to
28 preserve your thoughts, your discussions and comments to the
8396
1 conclusions of the case in the jury-deliberation room.

2 That's a really an important, fundamental rule that you have
3 to abide by.

4 So, again, thank you for your attention, your
5 participation. We are going to proceed now with the
6 examination.

7 MR. PAUL: Thank you, your Honor.

8 Good morning, everyone.

9 CONTINUED TESTIMONY OF
10 DAVID TOWNSEND, a witness called by the Defendant RJR:

11 CROSS EXAMINATION CONTINUED

12 BY MR. PAUL, Counsel for the Plaintiff:

13 Q. Good morning, Dr. Townsend; how are you?

14 A. Good morning; fine, thanks.

15 Q. Dr. Townsend, I want to go over a couple of things
16 that you mentioned I believe on Friday.

17 At RJR, could you tell us how many scientists and
18 staff work in R&D at this point in time?

19 A. Presently there's about 370.

20 Q. Okay, and of those 370 people, how many have Ph.D.s?

21 A. Somewhere in the neighborhood of 60, 65, thereabouts.

22 Q. Okay. Sir, you know how many of those Ph.D.s in the
23 R&D department believe that cigarette smoking causes lung
24 cancer?

25 A. No, I don't know exactly how many do or what their
26 exact opinions are.

27 I do know that periodically we collect the experts in
28 R&D in biology, the people who can really weigh in on this
8397

1 subject, and we do have discussions based on the science
2 that's available at the time.

3 Q. It has been consistent in your testimony that you do
4 not know how many believe smoking causes lung cancer,
5 correct?

6 A. Within R&D?

7 Q. Yes.

8 A. That's correct, I've not done a poll of every
9 scientist in R&D. We do collect the experts in biology to
10 discuss the issue.

11 Q. The answer for bladder cancer and smoking would be
12 the same; you do not know, correct?

13 A. That's correct.

14 Q. Same answer for chronic heart disease; you do not
15 know how many people it is caused by smoking, correct?

16 A. That's correct.

17 Q. Same answer for kidney cancer, correct?

18 A. Again, you're referring to all scientists in R&D?

19 Q. Correct.

20 A. That's correct.

21 Q. Same for oral cancer, correct?

22 A. Yes.

23 Q. Same for pancreatic cancer, right?

24 A. Right.

25 Q. It's also your opinion that you do not know how many
26 believe nicotine is addictive, correct?

27 A. I've not done a poll of every scientist working
28 in R&D.
8398

1 Q. Okay. Or how many believe that cigarettes are a
2 drug-delivery device, correct?

3 A. I've not done a poll of every scientist in R&D.

4 Q. Now, you say that you get together with people who
5 have backgrounds in biology; is that correct?

6 A. Biology and toxicology primarily.

7 Q. And how many of those people believe that cigarette
8 smoking causes lung cancer?

9 A. Um, an exact number?

10 I don't know an exact number. I would say there's a
11 fair number that do believe that cigarette smoking causes
12 cancer.

13 I think there's a fair number that belief that
14 causation has not been demonstrated scientifically in
15 rigorous fashion.

16 I think every scientist in my department, however,
17 does believe that cigarette smoking is a very strong risk
18 for cancer.

19 Q. Well, how many scientists have Ph.D.s in biology and
20 toxicology?

21 A. Um, I would say probably 25 or so.

22 Q. All right. And so as I understand it, you get
23 together from time to time and discuss the scientific
24 literature; is that correct?

25 A. We do.

26 Q. All right. And have you done that since 1977?

27 A. Yes.

28 Q. Okay. And how often do you all get together and

8399

1 discuss the scientific literature about smoking and cancer?

2 A. It depends on what's in the literature. There can
3 be -- There can be cycles where there's a lot of new
4 information in the scientific literature. There can be a
5 period of time where there's not so much new. So we review
6 the issues as the science dictates, really.

7 Q. How often is that?

8 A. I would say once every year and a half or two years.

9 Q. So once every year and a half or two years, you get
10 together, Ph.D.s in biology and toxicology, and you discuss
11 the literature. And at those meetings do people say, you
12 know, "I really don't believe the literature has now proved
13 that smoking causes lung cancer"?

14 Is that how it comes up?

15 A. Well, not in such a broad sense. We go in, and we
16 look at, for example, particular pieces of information,
17 particular experiments that may have been done. We discuss
18 the strengths and weaknesses of those experiments. We
19 compare them to some the results that we may have obtained
20 in our lab or in contract laboratories.

21 So we try to look at the whole picture in a
22 scientific way.

23 Q. But somehow the subject must come up, because you
24 said it's discussed at these meetings, correct?

25 A. Exactly what, sir?

26 Q. Well, I asked you about whether or not people believe
27 smoking causes lung cancer as one example, and you said,
28 well, we get together and we discuss these things.

8400

1 How does the subject come up then?

2 A. Well, it comes up in the course of that discussion.

3 Q. All right. And so you sort of go around the room and

4 you say, "Okay, who beliefs smoking causes lung cancer?"

5 A. Well, we go around the room for sure, and we get

6 everybody's opinion on the table about what they believe

7 about cigarette smoking and cancer. And there is -- As you

8 can imagine, there's a range of opinion.

9 Q. Okay. Has it ever reached more than 50 percent

10 believes that smoking causes lung cancer?

11 A. In a scientifically rigorous way, no.

12 Q. You keep using the term "scientifically rigorous

13 way".

14 What I want to know is whether or not the Ph.D.s, a

15 majority of them, have ever stated since 1977 that cigarette

16 smoking, in their opinion, causes lung cancer? Causes?

17 A. There are a number of scientists at Reynolds who have

18 said that.

19 Q. Has it ever exceeded 50 percent?

20 A. I don't believe so.

21 Q. What percentage would you say?

22 A. I don't know. I just -- I mean, that would be a

23 wild guess because it does change.

24 You know, the point is, you know, I believe in the

25 scientifically rigorous way that it -- That the proof is

26 not there because we don't have mechanisms and an inhalation

27 model, animal model, but I've already stated in this

28 courtroom that I believe it's more probable than not.

8401

1 Now, where in the spectrum does that fall? I think

2 that falls at some point a slight difference than a number

3 of other people.

4 Q. Would you agree that you think that most people in

5 the scientific community, particularly in medical research,

6 as well as most people in public health, as well as most

7 non-scientists, believe that cigarette smoking causes lung

8 cancer? Correct?

9 A. I believe that.

10 Q. Okay. And that's true in general basically around
11 the world, correct?

12 A. I would agree with that.

13 Q. But not at RJR? Right?

14 A. There are many scientists at RJR who have the same
15 conclusion.

16 There are a number that don't.

17 Q. But no more -- They never reached 50 percent at the
18 time, correct, at RJR?

19 A. I would say it's not more than 50 percent, but I do
20 think that every person on my staff believes that cigarette
21 smoking is a strong inherent risk for lung cancer and a
22 number of other diseases.

23 Q. Okay. You were talking about, on direct examination,
24 websites, correct?

25 A. I think we mentioned that, yes.

26 Q. And you talked about having reviewed other people's
27 websites, correct?

28 A. Yes.

8402

1 Q. Philip Morris's website you have reviewed; have you
2 not?

3 A. I've read it, yes.

4 Q. Okay. Their website talks about their understanding
5 of whether lung cancer is caused by smoking, correct?

6 A. Um, all I know is what's written on that website. I
7 don't know whether that's a scientific understanding,
8 whether that's agreed to by their research and development
9 department. I just don't understand -- I don't know the
10 background for that.

11 Q. You would agree that the scientific literature,
12 scientists around the world, believe that cigarette smoking
13 is addictive, correct?

14 A. I think most people believe that cigarette smoking is
15 addictive.

16 Q. RJR tells people it is not addictive, correct?

17 A. I don't know that that's the right characterization
18 of what RJR tells people.

19 I believe -- And I think my company believes, that
20 cigarette smoking, whether or not cigarette smoking is
21 addictive depends on the definition.

22 If what you mean by "addiction" is that it's a very
23 pleasurable habit and can be very, very difficult to quit,
24 then that's addictive. And in that sense I believe
25 cigarette smoking is addictive.

26 Q. Do you agree with the statement, "We agree with the
27 overwhelming medical and scientific consensus that cigarette
28 smoking is addictive"?

8403

1 A. I don't agree with that statement as it's written.
2 I think I've already characterized my opinion about
3 addiction.

4 Q. So you would say that what Philip Morris puts on
5 their website is incorrect; isn't that true?

6 A. That's not what I said. I said that's not my
7 conclusion.

8 Q. You would not say that the overwhelming medical and
9 scientific consensus is that cigarette smoking is addictive?

10 A. I think there's a consensus, a large consensus around
11 the world, and particularly in the United States, that
12 cigarette smoking is addictive.

13 Q. You just wouldn't say "overwhelming"?

14 A. (No Response)

15 Q. Is that what you're saying?

16 A. No. I think, in essence, I think that statement is
17 right. There is an overwhelming consensus.

18 Q. Okay. Would you agree with the statement, "We agree
19 with the overwhelming medical and scientific consensus that
20 cigarette smoking causes lung cancer, heart disease,
21 emphysema and other serious ill -- Diseases in smokers"?

22 A. Are you asking if I agree with that whole sentence?

23 Q. Yes, sir?

24 A. Because the sentence starts out, "We agree".

25 Q. Yes.

26 A. Well, I don't agree with that. Certainly, Philip
27 Morris has said that on their website. I think there is a
28 consensus that cigarette smoking causes lung cancer and
8404
1 other diseases.

2 Q. Okay. Just so we're clear: You do not agree that
3 there is overwhelming medical and scientific consensus that
4 cigarette smoking causes lung cancer, heart disease,
5 emphysema and other serious diseases in smokers?

6 A. That's not what I said. I said that I agree with
7 that portion of the sentence. The first two words of the
8 sentence as you read it are "we agree", and I think that's
9 Philip Morris's conclusion.

10 Q. Now, you have, in your work at Reynolds, had occasion
11 to review the Surgeon General's Reports, correct?

12 A. Yes. I've reviewed a number of them.

13 Q. Have you not reviewed them all?

14 A. No, I haven't.

15 Q. The Surgeon General's Reports on smoking, obviously,
16 that's what I'm talking about.

17 A. That's what I'm talking about too.

18 Q. Okay. Is there some reason that you haven't reviewed
19 them all?

20 A. Well, I think some of them deal with very special
21 issues about smoking and health that I'm not really an
22 expert in.

23 Q. You have -- It's your opinion that, while you've
24 reviewed these reports, when it gets into the biological
25 implications that are placed in those reports, the
26 discussion of biological testing and that kind of thing,
27 those areas you have not read in great detail, correct?

28 A. It's fair to say that in the biology area, since I'm
8405

1 not an expert in it, a lot of it I don't understand.

2 Much of that I've not read in detail.

3 When it comes to biological implications, yeah, I try
4 to ferret out or sort out what the implications are.

5 Q. It would be your statement that you do not fully
6 understand the biological implications of the report,
7 correct?

8 A. I don't fully understand the biology that's
9 discussed. At times I don't understand some of the
10 implications.

11 Q. And in fact you said that you wouldn't expect your
12 average 14-year-old to understand the biological
13 implications in the Surgeon General's Report, correct?

14 A. I don't remember saying that, but I generally agree
15 with that, yes.

16 Q. Now, as time went on at RJR, did opinion begin to
17 change on the subject of, based on your review of materials
18 in talking to scientists, on the subject of smoking causing
19 diseases in human beings?

20 A. Has the opinion shifted? Is that what you're asking?

21 Q. Yeah.

22 A. I don't know that the overall conclusion has really
23 changed very much. I think as long as I can understand from
24 the literature that goes way earlier than my employment,
25 there is that Reynolds clearly recognized that cigarette
26 smoking is a strong risk for cancer and other diseases.

27 Q. It would be a correct statement, would it not, that
28 the official position of RJR has been now for 50 years that
8406
1 smoking does not cause disease in human beings, correct?

2 A. That's absolutely wrong. We are not sitting here and
3 I'm not sitting here as a scientist and a witness in this
4 courtroom suggesting anything of the sort. There's no way
5 to prove that cigarette smoking does not cause cancer or any
6 other disease. There's a lot of evidence that cigarette
7 smoking is an extremely strong risk for a number of
8 diseases, so that totally mischaracterizes not only
9 Reynolds' position but my position as a scientist.

10 Q. All right. May I have the Elmo, please.

11 On Friday we looked at Exhibit No. 40, which was a
12 letter to fourth graders, dated May 1st, 1968.

13 Do you remember this document?

14 A. Yes.

15 Q. The statement: "Despite many years of extensive
16 research, medical science has been unable to establish that
17 smoking has a direct causal link with any human disease."

18 Does it say anywhere in there that smoking is a risk,
19 high risk to getting disease? Do you see that statement in
20 there?

21 A. I don't see the statement you're suggesting in there.

22 Q. All right. Thank you.

23 Four years later, I want to show you Exhibit 58.

24 MR. GROSSMAN: We'll need a copy, please.

25 Q. BY MR. PAUL: This is Exhibit 58, which is in
26 evidence (sic), dated April 7th, 1972. This is a letter to
27 fifth-grade students in Santa Monica about four years later.

28 Four years later, RJR said, "Despite all the research
8407
1 going on, medical science has not found any conclusive
2 evidence that an element in tobacco or tobacco smoke causes
3 any" --

4 MR. GROSSMAN: Your Honor, may we approach.

5 THE COURT: Yes.

6 (At Bench)

7 ---o0o---

8 MR. GROSSMAN: I've been advised by Miss Kessler that
9 although there is an appearance --

10 THE COURT: Keep it down. I don't want the jurors to
11 hear this.

12 MR. GROSSMAN: Sorry.

13 Although there's an appearance on the Court list that
14 this document has been admitted, it has not been admitted,
15 according to our review of the transcript.

16 And we've raised it with the clerk.

17 THE COURT: Is it in?

18 THE CLERK: I wasn't here on those --

19 MR. PAUL: I have it as admitted, and it's on the
20 list as admitted.

21 THE CLERK: I wasn't here then.

22 MR. PAUL: It's an RJR document. I can lay a
23 foundation for it. But it even has the -- Has their
24 address on it and the whole thing.

25 MR. GROSSMAN: My understanding is it hasn't been
26 admitted, and it was shown to the jury.

27 MR. BARRON: It may be too big a deal.

28 MR. GROSSMAN: I'm not making it as too big a deal.

8408

1 MR. PAUL: If it's not in evidence, I would like to
2 get it admitted in evidence --

3 MR. GROSSMAN: If you'll give me are moment to review
4 it, then I can --

5 THE COURT: Okay, let's do that.

6 (Back In Open Court)

7 ---o0o---

8 THE COURT: Okay.

9 MR. GROSSMAN: Your Honor, I believe that plaintiffs
10 need to move this into evidence. If the plaintiffs move
11 this into evidence, we have no objection.

12 MR. PAUL: If it's not already in evidence, then I
13 would move it into evidence.

14 THE COURT: Okay, it's received.

15 MR. PAUL: Thank you. Okay.

16 (Plaintiff's Exhibit 58, previously Marked for
17 Identification, was received In Evidence.)

18 MR. BARRON: I guess technically we need to have a
19 limiting instruction.

20 THE COURT: This is limited to R.J. Reynolds and not
21 to be considered as to Philip Morris.

22 Q. BY MR. PAUL: And just so we're clear for the record,
23 this, document says R.J. Reynolds Tobacco Company,
24 Winston-Salem, North Carolina.

25 And is that the RJR logo there?

26 A. That's correct.

27 Q. Mr. Kenneth Bersinger, Fifth Grade, Room 404,
28 Will Rogers Elementary School, 2401 14th Street, in Santa
8409

1 Monica, California.

2 Is that right?

3 A. That's correct.

4 Q. And then if you read the first paragraph: "The
5 letters you and other members of your class wrote to various
6 officials of our company regarding the Winston ad you saw in
7 the Los Angeles Times have come to this department for
8 reply."

9 And then in the last paragraph it says: "Despite all
10 the research going on, medical science has not found any
11 conclusive evidence that an element in tobacco or tobacco
12 smoke causes any human disease."

13 That is in fact a false statement; is it not?

14 A. Um, as written, I would say that even today medical
15 science has not found any conclusive evidence that the
16 levels in tobacco smoke causes any human disease.

17 Q. It doesn't say anything about levels?

18 A. No, it doesn't.

19 Q. It says that the way that this is written, that
20 statement is false, correct?

21 A. It depends -- It depends on how one interprets this
22 question.

23 I think certainly the compounds in cigarette smoke --
24 There are many carcinogens -- But at the levels in
25 cigarette smoke scientists don't know what in cigarette
26 smoke may be responsible for risks.

27 Q. And then, benzopyrene causes illness in human beings,
28 correct?

8410

1 A. There's no evidence that it does at the levels in
2 cigarette smoke, and that's in fact what I'm trying to tell
3 you.

4 Q. Nitrosamines cause human illness and disease,
5 correct?

6 A. There is no medical evidence that that is the case.

7 Q. So when you wrote to these five grades or when RJR

8 wrote to these fifth graders, they were telling them the
9 truth?

10 A. Yes, I believe that is the truth. At the levels in
11 cigarette smoke, no one knows what in cigarette smoke is the
12 problem.

13 And let me make it clear that if we did know what was
14 the problem, it would make our job easier to reduce or
15 eliminate those compounds.

16 MR. PAUL: I would move to strike the last as
17 non-responsive.

18 THE COURT: It's stricken.

19 MR. PAUL: All right.

20 Let me show you Exhibit 489. This is a letter dated
21 March 26, 1976. This is four years later.

22 MR. GROSSMAN: Mr. Paul, if you could just give us a
23 moment to look at it.

24 Is this in evidence?

25 MR. PAUL: Yeah. It is in evidence.

26 Q. Have you seen this document before?

27 A. In the course of litigation, yes.

28 Q. "This company does not regard itself as being in any
8411 way responsible."

2 Do you believe corporations have a duty for personal
3 responsibility?

4 A. Of course, I do. You've taken this out of the
5 context of this letter, however.

6 Q. "We firmly believe that all cigarettes have been
7 unfairly blamed as a cause of human disease."

8 Do you know who was unfairly blaming cigarettes for
9 human disease?

10 A. Well, I don't know what was in Mr. Cahill's mind.

11 Certainly the public health community and medical science
12 has concluded, most of the people have concluded, that
13 cigarette smoking causes those diseases.

14 Q. Well, when you -- When it says "unfairly blamed",
15 that would be the Surgeon General of the United States; is
16 that correct?

17 A. The Surgeon General has concluded that.

18 Q. Okay. The proposition that cigarettes are at fault
19 has been so widely accepted as fact by so many otherwise
20 responsible people and the evidence to the contrary has been
21 so uniformly disregarded, that we cannot blame you and other
22 members of the public for accepting the proposition as
23 fact."

24 Now, when it says "the evidence to the contrary",
25 when you got to RJR about a year after this, there was
26 evidence to the contrary that cigarette smoking -- well, let
27 me ask it in a different fashion.

28 There's evidence that demonstrates that cigarette
8412
1 smoking does not cause human disease?

2 A. No, there's not. We've talked about this at great
3 length in the testimony. There is no dispute, no argument
4 that the epidemiology is very strong, cigarette smoking is a
5 strong risk.

6 Q. Right.

7 A. There are several things missing for determining
8 causation, however.

9 Q. Okay. Just so I'm clear: There is no evidence to
10 prove that cigarette smoking does not cause human disease;
11 correct?

12 A. I think I've already talked about this, that is
13 absolutely correct.

14 MR. PAUL: Sir, I'm going to move to strike as

15 non-responsive. The answer "yes" or "no" --

16 THE COURT: Denied. Next question.

17 Q. BY MR. PAUL: Okay. "I do not wish to burden you,
18 especially at this difficult time in your life, with the
19 details of the smoking-and-health controversy."

20 Was there a smoking and health controversy in 1976?

21 A. I don't know that I would use the term "controversy".
22 There were certainly some scientific debate.

23 Q. However, there was no controversy in Reynolds, was
24 there?

25 A. No, I disagree with that completely. I think there's
26 been discussions within Reynolds over the science and what
27 it means all along.

28 Q. All right. "However, on the assumption you may be
8413

1 interested in our side of the matter, we are enclosing a
2 copy of the booklet entitled" -- What's the name of that
3 booklet?

4 A. That sentence says "The Cigarette Controversy."

5 Q. Do you see anywhere in this letter where it said
6 cigarette smoking is a high risk for causing human disease?

7 A. No, I don't.

8 Q. Prior to about -- well, the early 1950s, RJR did not
9 have a research and development department, correct?

10 A. It was established in the early '50s.

11 Q. How long had RJR existed before the early '50s?

12 Well, that's a bad question.

13 How long have they been manufacturing cigarettes
14 before the early '50s?

15 A. Oh, approximately 50 years, a little less.

16 Q. And the first time they established an R&D department
17 was in the early '50s; is that correct?

18 A. That's right.

19 Q. About the time that Claude Teague wrote his 1953
20 memorandum, correct?

21 A. Similar time.

22 Q. In fact, it sort of became coincidence with
23 Mr. Teague writing his '53 memorandum, correct?

24 A. Reasonably coincidental, and is that I think an
25 appropriate first step in one forming a department, and that
26 is to find out what the scientific community knows.

27 Q. Now we looked at that Claude Teague memorandum
28 yesterday -- or on Friday, excuse me -- where he indicated
8414
1 that the clinical data confirmed a relationship between
2 heavy and prolonged smoking and incidence of lung cancer.

3 Do you remember that?

4 A. Yes. That is epidemiology.

5 Q. At any point before 1969 was the public ever told of
6 that finding by RJR?

7 A. Not by RJR. The public health community, of course,
8 did.

9 Q. The answer to my question is: RJR never told the
10 public, correct?

11 A. Before what date?

12 Q. 1969.

13 A. I don't know that it told the public. It did tell
14 others, though.

15 Q. Okay. That was one of the things that you had
16 indicated, that scientists on the outside had access to RJR
17 scientific studies, correct?

18 A. I'm sorry?

19 Q. In your earlier testimony on direct, you had
20 indicated that scientists on the outside of RJR had access
21 to RJR scientific studies?

22 A. Yes, we had published the results of our studies.

23 Q. They didn't have access to your studies, did they?

24 A. No, of course, not. Some are proprietary.

25 Q. In fact, in 1987, RJR actually came up with a

26 cigarette -- Well, let me go back a second.

27 You talked to the jury, you showed some diagrams of

28 what was done to make cigarettes less risky. You talked
8415

1 about expanded tobacco and things of that sort.

2 Do you remember that?

3 A. Sure.

4 Q. One was reducing the circumference, correct?

5 A. That's right.

6 Q. Oh, before I get to that, let me ask you a question:

7 What does it cost RJR to make one cigarette?

8 A. I really don't know as we sit here.

9 Q. As executive vice-president and head of cigarette

10 design, you don't know what it costs to make a cigarette?

11 A. There are different costs depending on the brand;

12 different brands cost different amounts.

13 Q. Let's pick one. Let's pick Winston.

14 A. Um, I would say the production costs for a pack of

15 Winstons would be -- I don't know -- 30 cents.

16 Q. Thirty cents?

17 A. Yes.

18 Q. Okay. About a penny -- How many in a pack?

19 A. Twenty.

20 Q. So about a penny and a half a cigarette?

21 A. And that would just be my best guess as we sit here.

22 Q. And RJR is, what, number two in the country in

23 producing cigarettes?

24 A. Yes.

25 Q. Philip Morris is number one?

26 A. Yes.

27 Q. You have about, what, 25 percent of the market?

28 A. About 23 percent of market.

8416

1 Q. And could you tell us how many cigarettes RJR sells a

2 year?

3 A. In 2002 we shipped about 90 billion cigarettes.

4 Q. I'm sorry. I missed that?

5 A. Ninety billion.

6 Q. Ninety billion.

7 Now, these changes that you talked about, expanded

8 tobacco, for instance, let me take that one.

9 If you expand the tobacco, it saves on tobacco,

10 doesn't it?

11 A. Sure, it does.

12 Q. So you can use less tobacco in a cigarette, right?

13 A. That's right.

14 Q. That's a cost savings, isn't it?

15 A. It is a cost savings.

16 Q. If you reduce the circumference of a cigarette, that

17 is a cost savings, isn't it?

18 A. To the extent that there's less tobacco.

19 Q. And in making your decision, the company's decisions

20 on cigarettes, profit goes into those decisions, doesn't it?

21 A. Sometimes.

22 Q. Do you recall that in 1987 RJR looked at making a

23 bigger circumference cigarette?

24 A. I do.

25 Q. And it was to be directed toward young adults?

26 MR. GROSSMAN: Your Honor, may we approach.

27 THE COURT: Yes.

28

(At Bench)

8417

1 ---o0o---

2 MR. GROSSMAN: I believe the product that Mr. Paul is
3 about to ask about was marketed in 1988, first marketed in
4 1988 during the immunity period.

5 MR. PAUL: I'm not going to give them 1988. I'm just
6 going to ask them if they started making a design in 1987.
7 I don't care when they marketed it; I'm not going to get
8 into marketing.

9 THE COURT: Okay. Limit it in that fashion.

10 MR. PAUL: Okay.

11 (Back In Open Court)

12 ---o0o---

13 Q. BY MR. PAUL: Now, this product that -- This product
14 that is being developed in 1987 was to be targeted to
15 younger smokers, correct?

16 A. The target smoker demographics was young adult males.

17 Q. Okay. And you would agree, would you not, that
18 putting out this cigarette, the cigarettes that you were
19 discussing in 1987, that it carried with it a higher risk of
20 cancer, correct?

21 A. No, I don't agree with that, because while an
22 increased-circumference cigarette burns more tobacco, there
23 are other cigarette design tools that reduce the tar and
24 nicotine yield. And in fact the target -- Or target tar
25 yield of that product was the same as other product in the
26 market.

27 Q. Are you familiar with the word "mutagenicity"?

28 A. Yes.

8418

1 Q. What is mutagenicity?

2 A. Mutagenicity is mutations in cell tests.

3 Q. That cigarette would have had increased mutagenicity,

4 correct?

5 A. Not necessarily.

6 Q. Do you recall testifying in the Minnesota case, 1998?

7 A. I don't remember the details, but I remember the

8 subject coming up.

9 MR. PAUL: I would like to read from the testimony,

10 Minnesota -- The date of the testimony was April 2, 1998.

11 Page 10538.

12 MR. GROSSMAN: Mr. Paul, could we have a copy.

13 MR. PAUL: I'm sorry.

14 MR. GROSSMAN: What lines do you hope to read?

15 MR. PAUL: One through eight.

16 MR. GROSSMAN: In the rule of completeness, I would

17 ask that you read through line 15.

18 MR. PAUL: Okay. That's fine.

19 THE COURT: Okay.

20 MR. PAUL: "QUESTION: Now you would agree that

21 the wider the circumference, the greater the

22 mutagenicity of a cigarette, correct?

23 "ANSWER: In a general, sense.

24 "QUESTION: Yes?

25 "ANSWER: I've seen some data that suggest that

26 going to very small circumference reduces" -- Let

27 me do that again.

28 "I've seen some data that suggest that going to

8419

1 very small circumference reduces the mutagenicity,

2 the Ames mutagenicity to a degree.

3 "QUESTION: So if it's wider, it's got greater

4 mutagenicity under the Ames Test, correct?

5 "ANSWER: If you're speaking to the Camel Wide

6 product, we tested this product for the Ames

7 mutagenicity and found more significant different

8 at a circumference of 12.5 compared to the
9 standard circumference of 24.8."

10 Q. Do you remember that testimony?

11 A. I do remember that, and there's actually documents
12 that speak to that, that show that going into very small
13 circumference does show some reduction in mutagenicity.
14 However, the difference between standard circumference and
15 Camel Wide circumference, which is the product that we're
16 talking about, made no difference in mutagenicity.

17 Q. When you were considering putting that cigarette out,
18 you were concerned about whether or not it might be more
19 risky for the user; is that correct?

20 A. Absolutely. That's part of our stewardship program
21 at Reynolds. When we make significant changes in cigarette
22 design, we test both chemically and biologically to make
23 sure that nothing we do increases the risk.

24 So the question was: Does going to a higher
25 circumference or wider or larger circumference, does that
26 increase the risk? And all of the testing that we conducted
27 said no.

28 Q. Now, as a designer of cigarettes, you take into
8420
1 consideration the statistics that may exist regarding the
2 risk of a cigarette, correct?

3 A. You talking about epidemiology?

4 Q. Sure, okay.

5 A. No. Epidemiology is not used in designing
6 cigarettes. Our cigarette designers, including myself,
7 understand that the epidemiology is there, that it's very
8 strong.

9 But I don't know how one would use those statistics
10 in designing cigarettes. We design cigarettes to try to

11 reduce biology and try to reduce chemistry, and hopefully
12 thereby we reduce mutagenicity.

13 Q. You're familiar with the 1989 Surgeon General's
14 report, are you?

15 A. I've received portions of it.

16 Q. This is Exhibit AS-00035.

17 I want to show you page five of that report.

18 First paragraph: "Each of the last five Surgeon
19 Generals of the U.S. Public Health Service, parens, P.H.S.,
20 close parens, has identified cigarette smoke as one of this
21 nation's most significant sources of death and disease.

22 "Today, more than one of every six American
23 deaths is a result of cigarette smoking. Smoking
24 is responsible for an estimated 30 percent of all
25 cancer deaths, including 87 percent of lung
26 cancer, the leading cause of cancer mortality; 21
27 percent of death from coronary heart disease; 18
28 percent from stroke deaths; and 82 percent of
8421

1 deaths from chronic obstructive pulmonary
2 disease."

3 As someone who's involved in designing cigarettes,
4 those are frightening statistics; wouldn't you agree?

5 A. I think these are serious statistics. I've seen
6 other statistics that are different numbers, but certainly
7 they are serious.

8 Q. Well, you would agree that every major medical
9 organization in this country says that smoking causes about
10 400,000 deaths per year, correct?

11 A. I've heard that number from several organizations.

12 Q. Do you dispute that number?

13 A. I'm not an expert. I can't dispute it one way or the
14 other.

15 Q. But as a designer, those are things that you take
16 into consideration, correct?

17 A. No. Those statistics don't directly guide our
18 research and development. Cigarette design work -- In
19 fact, I think I've already made it clear in my earlier
20 testimony last week that what we do in R&D is assume. We
21 take as our operating premise that cigarette smoking does in
22 fact cause cancer, cardiovascular disease, chronic
23 obstructive pulmonary disease and a number of others. We
24 take that as an -- As a premise, and with that assumption
25 we then try to do something about the cigarette design.

26 Q. This is from page 12 of that exhibit.

27 "Cigarette smoking is a major cause of
28 cerebrovascular disease, paren, stroke, close
8422
1 paren, the third leading cause of death in the
2 United States.

3 "By 1986, lung cancer had caught up with
4 breast cancer as the leading cause of cancer death
5 in women. Women smokers' relative risk of lung
6 cancer has increased by a factor of more than four
7 since the early 1960s and is now comparable to the
8 relative risk identified for men in that earlier
9 period.

10 "Gender differences in smoking behavior are
11 disappearing. Consistent with this, gender
12 differences in the relative risks of and mortality
13 from smoking-related diseases are narrowing."

14 Now, you folks at RJR, when you saw statistics like
15 that, did you start to think, wow, maybe cigarette smoking
16 does cause lung cancer? "Cause"? Not "a high risk"?

17 A. Again, what we look to in R&D is the science, the

18 underlying science that may prove causation. In any event,
19 though in our product development work, we assume that it
20 does.

21 Q. You assume now that it does?

22 A. That's our working premise that we've talked about.

23 Q. If I show you page 48 of that document. You've seen
24 this graph before?

25 A. I think I have, yes.

26 Q. It shows lung cancer rates from the '30s through the
27 '80s and into the '90s, correct?

28 A. Yes.

8423

1 Q. You as a scientist when you see that curve, does it
2 leave any question in your mind that smoking causes lung
3 cancer?

4 A. This chart is -- This chart does show a rapid or a
5 large increase over 50 years for lung cancer adjusted,
6 age-adjusted cancer death rate. I guess that's total
7 cancer; that's not just lung cancer.

8 It does not change my opinion from the scientific
9 point of view, and it doesn't change what we do at R&D.

10 Q. Let me show you page 51. Are you familiar with this
11 graph?

12 A. It looks familiar.

13 Q. This shows the increase of adenocarcinoma per 100,000
14 population of males, correct?

15 A. Right. I can't read which curve is which, however.

16 Q. If I told you adenocarcinoma is the top curve -- The
17 one that goes like that and up? --

18 MR. GROSSMAN: Objection, your Honor. I think that
19 misstates the chart.

20 Q. BY MR. PAUL: Do you know which one it is?

21 A. I can't read it from here.

22 Q. All right. Adenocarcinoma, hasn't it gone up since
23 the '30s?

24 A. I'm aware that adenocarcinoma incidence has gone up
25 since the last 60, 70 years.

26 Q. Do you believe that's been caused by lung cancer --
27 By smoking?

28 A. I don't know.
8424

1 Q. Do you believe that there's a dose relationship
2 between smoking and lung cancer?

3 A. Absolutely I do. That is in fact what comes out of
4 the epidemiology, that there's a dose/response relationship.

5 Q. This is page 90 -- or 85 of the Surgeon General
6 report from '89.

7 "As discussed in part one, epidemiologic studies have
8 demonstrated a dose/response relationship between the number
9 of cigarettes smoked and the development of cancer of the
10 lungs, larynx, oral cavity, esophagus, pancreas, bladder and
11 kidney."

12 That is a statement that you agree with?

13 A. Yes, I do. Even though I think you misread it, I do
14 agree with that statement. There is a dose/response
15 relationship between the number of cigarettes smoked or the
16 exposure that the smoker gets and the number of diseases,
17 including the ones that are spoken here to. That is the
18 epidemiology evidence.

19 Q. Are you familiar with this chart, which is pages 86
20 and 87 of the Surgeon General's Report?

21 A. Yes.

22 Q. You're going to have to help me with this word, it's
23 "tumorigenic agent and tobacco and tobacco smoke"?

24 A. That's right.

25 Q. Do you think that's a complete list of them?

26 A. Well, I think this is a list of many of the ones that
27 we've talked about in the testimony. It's a list of those
28 that we have looked at at Reynolds. I don't think it's a
8425

1 complete list, as I've already testified to, of all the
2 carcinogens or potential toxic compounds in cigarette smoke,
3 because if we continue to study smoke composition, I'm
4 convinced that we will continue to find additional ones at
5 very low levels.

6 Q. That was going to be my next question to you.

7 You know -- Well, let's go back.

8 A number of carcinogens have been identified in
9 tobacco smoke, correct?

10 A. Yes.

11 Q. You believe there are more, correct?

12 A. I believe that, as analytical techniques get more
13 sensitive, I think we'll find more, yes.

14 Q. So when you're designing this product, you, as a
15 designer, know that as you're trying to lower the risk of
16 cancer from cigarettes, that in your own mind you know there
17 are other agents in there, which you don't even know
18 about -- That are cancer-producing? Correct?

19 A. Well, I think I've already said what I believe.

20 I believe that there are certainly more carcinogens
21 in smoke, albeit at very low levels, because we've
22 characterized carcinogens in the nanogram and even some in
23 the picogram range. Picogram is a trillionth of a gram per
24 cigarette.

25 Do I believe that we can identify others that -- In
26 the picogram or even the fentogram range? Yes, I do. But
27 they're at very low levels. The consequence of that to
28 disease is unknown.

8426

1 Q. And in fact, one of the reasons -- Well, if we even
2 talk about Eclipse, it's your opinion there is still a
3 measurable risk that this Eclipse cigarette will cause
4 cancer? Correct?

5 A. Sure. There is no safe cigarette, and we make that
6 very clear, the scientists at Reynolds. While I believe
7 that we've done, I think, a very clever and innovative, and
8 I think important job in developing Eclipse and its
9 predecessor Premier, I don't think it's a safe cigarette.

10 But I do believe that Eclipse, through biology, has
11 been demonstrated to reduce risks, particularly of cancer,
12 bronchitis and possibly emphysema.

13 Q. "Possibly"?

14 A. Yes.

15 Q. Now, would you agree with the statement that there's
16 no evidence RJR has that can confirm that low-tar cigarettes
17 are safer than any other cigarette?

18 A. I don't know, first of all, that Reynolds would say
19 that -- As a company. I think scientifically, as one looks
20 at the evidence, there's very good epidemiology in many
21 studies that suggest that low-tar cigarettes in fact present
22 less risk than high-tar cigarettes.

23 Q. Is that the position of the Surgeon General?

24 A. I think the Surgeon General -- It depends on which
25 report you're looking to. The 1981 report that we were just
26 looking at, the Surgeon General made a statement in there,
27 something to the effect that the tar-reduction program has
28 in fact reduced the risk of smoking.

8427

1 Q. Is that what Philip Morris said?

2 A. I don't think so.

3 Q. In fact, they say the opposite, don't they?

4 A. I think Philip Morris, in some information I've seen,
5 refers people to the Public Health Service.

6 Q. Now, would it be a true statement -- Now, you don't
7 have any evidence at RJR to confirm that low-tar cigarettes
8 are safer than any other cigarettes, do you?

9 A. What I've just told you is that there is epidemiology
10 in a number of studies that shows that low-tar cigarettes
11 present less risk; that is, they have a lower risk factor.
12 That's the evidence.

13 Q. I would like to read from the witness's testimony
14 March 31, 1998, in the Minnesota case.

15 MR. GROSSMAN: Could I see a copy first, please.

16 MR. PAUL: Lines 12 through 20. Page 10161.

17 MR. GROSSMAN: Fine. Could he provide a copy to the
18 witness as well, please?

19 MR. PAUL: I only have one copy.

20 THE COURT: Go ahead.

21 MR. PAUL: Thank you, your Honor.

22 "QUESTION: Now you don't have any evidence at
23 RJR to confirm that low tar-cigarettes are safer
24 than any other cigarettes, do you?

25 "ANSWER: There's no evidence at RJR that
26 low-tar cigarettes are safer than higher-tar
27 cigarettes, because there's no way to prove that
28 one cigarette is safer than another. I think a
8428

1 number of people have made that reference. The
2 Surgeon General has suggested that they -- That
3 there may be and others."

4 There is no way to prove that one cigarette is safer
5 than another; isn't that true?

6 A. Actually, that is very true. There is no definitive
7 test or experiment or groups of experiment that can

8 definitively prove it.

9 I think there is epidemiology that shows that it's a
10 reduced risk, and I think in response to that question,
11 there is no internally generated RJR information that would
12 conclude that low tar is reduced risk. But there is quite a
13 lot of external information -- Epidemiology that suggests
14 that it probably is.

15 Q. And the only reason that there's low-tar cigarettes
16 at RJR is because the public demanded lower-tar cigarettes
17 because of their concern about the risks, correct?

18 A. I think that's a major reason that there are low tar
19 cigarettes today. The public health -- It's actually, in
20 my opinion -- This is probably oversimplification, but
21 certainly the public health community for many, many years,
22 50 years, has, has argued that low-tar cigarettes are
23 probably better.

24 The public, hearing that information from the public
25 health community, began asking for low-tar cigarettes, and I
26 think it's been both of those.

27 Q. If the public had not demanded it, you still would
28 have had high-tar cigarettes, correct?

8429

1 A. No, I don't know that that's the case at all. I
2 think if the public hadn't accepted low-tar cigarettes as
3 smokers, if those products had not been commercially
4 acceptable or consumer acceptable, then, yes, we would
5 probably be where we were in 1950.

6 Q. I would like to read from the witness's testimony,
7 Minnesota testimony, March 31, 1998. Page 10183, line 19,
8 through page, 10184, line five.

9 THE WITNESS: May I have a copy too?

10 MR. PAUL: Sir, I don't know how many times I can say

11 it, I only have one copy.

12 THE COURT: We'll take a ten-minute recess. Please
13 don't discuss the case.

14 (The mid-morning recess was taken at 10:39 am.)

15 ---o0o---

16

17

18

19

20

21

22

23

24

25

26

27

28